Regional Competition Agreements: Benefits and Challenges

-- United States

1. The United States is not a member of any regional competition agreements, but it is a Party to the North American Free Trade Agreement (NAFTA), which has a chapter on Competition Policy, Monopolies and State Enterprises. This paper describes the provisions of that chapter, and then summarizes changes to the NAFTA competition provisions in the newly negotiated United States-Mexico-Canada Agreement (USMCA), which takes effect when ratified by the three jurisdictions. The USMCA competition chapter adds provisions on limiting antitrust exemptions, non-discrimination in enforcement, and comity, and includes a new article with procedural fairness disciplines. This paper discusses bilateral antitrust cooperation agreements among the competition authorities in North America, and concludes by comparing the effects on enforcement cooperation of the NAFTA/USMCA and the bilateral cooperation agreements.

1. The NAFTA Competition Policy Provisions

2. NAFTA reinforces, but in no way supplants, the national competition laws of Canada, Mexico, and the United States. Chapter 15 of the NAFTA covers competition policy, designated monopolies, and state enterprises. The chapter addresses two separate classes of conduct: anticompetitive business conduct and certain government conduct that could affect trade. A network of bilateral antitrust cooperation agreements, which are independent of NAFTA, guides the working relationships between and among the four competition authorities in the NAFTA area. Although these agreements and Chapter 15 create binding obligations on the Parties, none of these rights or obligations are subject to formal dispute settlement, with the exception of certain NAFTA provisions that address officially designated monopolies and state enterprises.

1.1. Anticompetitive Business Conduct

3. The core of NAFTA's provisions on anticompetitive business conduct is found in Article 1501. That Article requires that each Party "shall adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto." Article 1501 is silent as to the nature and form of measures required, and Article 201 defines a measure to include "any law, regulation, procedure, requirement or practice." In practice, however, all three Parties have complied with Article 1501 through legislation: the Sherman, Clayton, and Federal Trade Commission Acts in the United States; the Competition Act in Canada; and the Federal Law on Economic Competition in Mexico. NAFTA is similarly silent as to what might constitute "appropriate action" with respect to anticompetitive business conduct.

4. NAFTA also provides that the Parties will cooperate on issues of competition law enforcement practice, such as notification, consultation, and exchange of information. The provision does not specifically address cooperation at the level of the Parties' competition authorities. As discussed below, agency-to-agency cooperation is covered in a trio of bilateral antitrust cooperation agreements that is separate from the NAFTA framework.

E S . . 2 2 1 tste e tr e i e

12. The article on state enterprises is more limited in its reach than the article addressing officially designated monopolies. It similarly restricts the ability of governments to use state enterprises to circumvent certain NAFTA obligations in cases where they delegate governmental powers to state enterprises, such as the power to grant licenses, expropriate, approve commercial transactions, or impose quotas, fees or other charges. The only other discipline applicable to state enterprises is that Parties must ensure that they afford non-discriminatory treatment in the sale of their goods or services to investments of investors from other NAFTA states.

1.3. Dispute Settlement

13. Articles 1502 and 1503, concerning designated monopolies and state enterprises, are generally subject to NAFTA's state-to-state dispute settlement mechanism. Certain provisions on state enterprises or official monopolies are also subject to the investor-state dispute settlement mechanism set forth in the investment chapter of NAFTA. An investor may, on its own behalf or on behalf of an enterprise that it controls, bring a claim based on a violation of the anti-circumvention provisions applicable to state enterprises and designated monopolies when the violation impairs the investor's rights under NAFTA's investment chapter. By contrast, Article 1501, concerning antitrust issues, is not subject to dispute settlement.

2. The United States-Mexico-Canada Agreement (USMCA)

14. On September 30, 2018, the United States Trade Representative announced that Canada, the United States, and Mexico had reached agreement on the USMCA in the renegotiation of the NAFTA. The USMCA, which is undergoing approval procedures in the three Parties, revised parts of Chapter 15. The state enterprise and designated monopoly provisions have been expanded in a separate chapter, with a broader coverage of state-owned enterprises (SOEs) and new disciplines on transparency and non-commercial assistance provided by Parties to their SOEs.

15. The new Competition Policy chapter adds provisions on limiting exemptions from the coverage of antitrust laws; non-discriminatory enforcement; comity; nexus of remedial measures to harm in the territory of the agency imposing the remedy; and a separate article recognizing the importance of consumer protection policy and enforcement. There is also a new article on procedural fairness that includes provisions on transparency, time frames for enforcement actions, affording a reasonable opportunity to be represented by counsel, including through the recognition of attorney-client privilege, treatment of confidential information, reasonable opportunity of parties to contest allegations, engagement with the agency, access to evidence, the ability to contest allegations before an impartial authority, and the availability of judicial review of remedies. There are also new general articles on transparency of enforcement and advocacy policies and on consultations. Finally, the chapter is excluded from dispute settlement provisions in the treaty.

most of this information could also be shared in the absence of an agreement, the amount of actual cooperation directly derived from these provisions is more limited than it might at first appear. The presence of the provisions, however, does serve as a catalyst to increased cooperation.[2]

21. The United States and Canada have entered into an enhanced positive comity agreement. Although not invoked to date, this agreement allows antitrust enforcers in one country to request the other country's antitrust agency to investigate and take appropriate law enforcement action against anticompetitive conduct that both adversely affects the interests of the country requesting the investigation and violates the laws of the country responding to the request. The agreement also provides that the competition agency of the requesting Party will normally defer or suspend its enforcement activities in favor of a positive comity referral to the other country in cases where: (1) the foreign anticompetitive activities do not directly or principally affect the requesting party's consumers, or (2) the activities do have such an impact but occur principally in and are directed principally towards the other Party's territory.

3.2. Application to Actual Cases

22. There is frequent cooperation between and among the competition authorities in Canada, the United States, and Mexico. One of the most common areas of cooperation is merger cases. When mergers affect more than one jurisdiction, for example, staffs of the agencies routinely work together and, where appropriate, the parties will execute waivers that permit competition agency staffs to discuss information that they have obtained.[3] While agencies in different jurisdictions will seek different remedies appropriate to the particular market conditions in their territories, they will work together to try to achieve complementary and consistent remedies.

23. A good example of such cooperation is the 2014 acquisition of ZF Friedrichshafen AG and TRW Automotive Holdings Corp., which was reviewed by the FTC and the authorities in Canada and Mexico.[4] ZF and TRW were two of only three North American suppliers of heavy vehicle tie rods. The FTC alleged that the merger would eliminate competition between ZF and TRW and increase the likelihood of coordination between a

G